Supreme Court, U.S.
FILED
JUL 23 2002

(3)

No. 01-1643

In The
SUPREME COURT OF THE
UNITED STATES
October Term, 2001

KENNETH ALLEN GOLDBLATT
Plaintiff-Petitioner,
v.
A&W INDUSTRIES, INC.
Defendant-Respondent.

PETITIONER'S REPLY BRIEF

Frank P. Hernandez, Esq.
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (fax)
fgeagle@aol.com

COUNSEL FOR PLAINTIFF

13 RD

TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv-v
Petitioner's Reply Brief	19
Certificate of Service	21

TABLE OF AUTHORITIES

Case(s)	Page(s)
Broadland v. City National Bank of Corpus Christi 15 S.W.2d 112, 113, (Tex.Civ.App. 1929)	6
Cameron v. Gebhard 85 Tex. 616, 22 S. W. 1035, (Tex. 1893) 34 Am. St. Rep. 832	7, 8
Espinoza v. Cocke 276 S.W. 1095, (Tex.Com.App. 1925)	6
Gardner v. Douglass 64 Tex. 76, (Tex. 1885)	7, 8
McKee v. Smith 965 S.W.2d 52, 53, (Tex. App. – Fort Worth 1998, no writ)	8
Pioneer Investment Services Company v. Brunswick Associated Limited Partnership et al. 1993.SCT.1959 113 S.Ct. 1489, 123 L.Ed.2d 74, 61 U.S.L.W. 4263) <http://wwww.versuslaw.com>	4
Statutes and Rules	
Constitution	
Article 16, § 51 of the Texas Constitution	5
Fourth Amendment of the U.S. Constitution	9. 10

No. 01-1643
In The
SUPREME COURT OF THE
UNITED STATES
October Term, 2002

KENNETH ALLEN GOLDBLATT
Plaintiff-Petitioner,
v.
A&W INDUSTRIES, INC.
Defendant-Respondent

PETITTIONER'S REPLY BRIEF

PETITTIONER'S REPLY BRIEF

Respondent avoids addressing the core issues of this case by disagreeing with Petitioner's Statement of the Case. In doing so, Respondent has failed and refused to address the very questions raised by Petitioner. On this basis alone, Petitioner's request for review should be granted.

Further, Respondent has attempted to mislead this Court regarding the underlying facts of this case. Respondent falsely claims that Petitioner conducted a "wrongful foreclosure" which is simply untrue. [p. 1] The Tarrant County Probate Court ruled in Summary Judgment that on May 27, 1997, that "the foreclosure of the Landmark Life Insurance Company mortgage by Kenn Goldblatt on June 7, 1994, cut off all claims of A&W Industries, Inc. to any right or obligation to purchase the subject real property, as a matter of law." Further, the Probate Court, in its rendition, stated:

> Now as to the matter of the constructive trust, the Court has wrestled with

> this issue throughout the trial, and I'm of the belief that in order for the Court to invoke that remedy, **there must be clean hands on the part of the party requesting it.**
>
> And I just find that Ms. Rountree's testimony was so lacking, and so lacking in credibility, and that the lease was obviously violated. I think that if they had a lease, they should have been careful to p[illegible] the taxes. They should have observed the letter of the lease given the circumstances they were in, and I'm going to deny the constructive trust.
>
> That leaves – **the Court having previously found that Mr. Goldblatt's foreclosure was valid, the Court will not affect that.** [Rendition of Probate Court No. 2 of Tarrant County, Texas of July 28, 1999, [emphasis added]

The Probate Court did not hold the foreclosure to be invalid or unlawful. There is no final decision on this issue and Respondent never sued to set the foreclosure aside.

Inexplicably, however, the Probate Court granted Respondent a permanent injunction that it later construed as preventing Petitioner from evicting Respondent from the property for refusing to pay rent. Petitioner has therefore been placed in the position of owning property that he can neither manage nor control in direct violation of his constitutional property rights.

Respondent is incorrect in stating that the court below "has not departed from the accepted and usual course of judicial proceedings that would require this Court's supervisory power." Authority cited by Petitioner is clear

that illness of an attorney is adequate grounds for a finding of excusable neglect. Respondent attempts to confuse the Court as to the relationship of the attorneys involved. At all times relevant to the appeal to the Federal District Court, Petitioner's bankruptcy attorney was the attorney of record and responsible for all actions to be taken on Petitioner's behalf. The attorney who eventually entered on behalf of Petitioner did so after the events that led to the necessity of this appeal to the Fifth Circuit and now to this Court. In Texas, and most other jurisdictions, attorneys of record (and/or supervising attorneys) are responsible for actions taken in the case in question by any other attorney. In ruling that the mistakes involved at the District Court level were attributable to an attorney who had not yet entered the case, the courts below clearly ruled in conflict with established case law and guiding principle that is well settled in virtually every jurisdiction.

Respondent further errs [page 4] in stating "Petitioner did not show sufficient facts that would demonstrate that the Petitioner's delay was the result of excusable neglect.. . ." All parties agree that Petitioner's bankruptcy attorney was the attorney of record. They also agree that that attorney stated that he could not continue to represent Petitioner because he was going blind due to complications of diabetes. The case law is clear that such incapacity on the part of an attorney is sufficient to constitute excusable neglect.

Respondent simply argues that the law was correctly applied. Respondent, however, does not address the issue of which attorney was the attorney of record at the times relevant to the erroneous decisions of the courts below.

Respondent points out that the previous opinion [cited as Appendix B] "does not apply to any alleged

conduct or misconduct on the part of Petitioner's bankruptcy attorney." This statement is specifically Petitioner's point: It was the bankruptcy attorney who was the attorney of record – and therefore liable for any mistakes, acts or omissions on Petitioner's behalf. It was the bankruptcy attorney who was going blind. Therefore, it was the bankruptcy attorney to whom the excusable neglect is attributable, not the substitute attorney who did not enter the case until after the events in question.

There is no dispute that Goldblatt's bankruptcy attorney of record timely filed notice of appeal and, it is reasonable to conclude that had it not been for his untimely disability, would have completed the additional procedural steps required. The reasons that he did not fall squarely within the authorities' previous findings of "excusable neglect."

In *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership et al.*, 113 S. Ct. 1489 this Court recognized that:

> "There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. . . . Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of 'excusable neglect.' . . . [B]y empowering the courts to accept late filings 'where the failure to act was the result of

> excusable neglect,' Rule 9006(b)(1), **Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.**" *Id.* at 1491. [emphasis added]

The Court went on to say that: "This history supports our Conclusion that the enlargement of prescribed time periods under the 'excusable neglect' standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances **beyond the control of the filer**." Id.. at 1496. [emphasis added]

More important, however, Respondent fails and refuses to address Petitioner's arguments regarding the Homestead Issue. The Bankruptcy Court erroneously held that Goldblatt's business homestead claim should be denied because it did not fulfill the requirement of Article 16, § 51 of the Texas Constitution or § 41 of the Texas Property Code as amended because "the debtor has never been in possession of the Dawn Lane premises to conduct the debtor's business, and that the debtor has never lived in or on the Dawn Lane premises; and that **the Dawn Lane premises is not contiguous to the debtor's residential homestead at 3605 Wharton Drive, in Fort Worth, Texas 76133.**" [emphasis added]

In Texas, homestead in obtained by designation of the property owner. Throughout the litigation below, Respondent has attempted to designate Petitioner's homestead for its own purposes. It has neither the standing nor the authority to do so.

There is no dispute as relates to ownership of the property that is the subject matter of this action. On June 5, 2000, Petitioner filed an Affidavit of Business Homestead of record in the Tarrant County, Texas Deed Records.

In this case, the Bankruptcy Court's finding that the subject property "is not contiguous to the debtor's residential homestead" is clearly erroneous because no such "residential homestead" exists or has ever existed in the State of Texas or any U.S. jurisdiction. Further, the Bankruptcy Court's finding that Petitioner has never occupied the property is in conflict with guiding principles of Texas homestead law and ignores Petitioner's strenuous efforts to legally evict A&W from his homestead since 1994, so that he can take possession and occupy the property as his business homestead.

In *Broadland v. City National Bank of Corpus Christi*, 15 S.W.2d 112, 113, (Tex.Civ.App. 1929) the court addressed this very issue stating: **"In Texas actual occupancy of land is not absolutely essential to impress property with the homestead character, but property may become a home [homestead] by intention when such intention is accompanied by unmistakable acts that evidence the designation of a homestead."** [emphasis added]

The court stated in *Espinoza v. Cocke*, 276 S.W. 1095, (Tex.Com.App. 1925) at 1096:

"The Texas Supreme Court has held that **when an appellant demonstrated the required overt acts and intention to be entitled to a favorable homestead determination and an appellee's evidence to contradict such entitlement was insufficient to determine otherwise, the case should be remanded. When the Texas Supreme**

Court found that the record on appeal did not support the implied finding of the lower court, it ruled that the lower court's implicit finding of no homestead was in error." [emphasis added] *Parrish v. Hunt*, 160 Tex. 378, 331 S.W.2d 304, 305 (Tex. 1960); See also: 43 TEX. JUR. 3d, Homesteads, Sec. 77, 135- 137 (1985).

The Texas Supreme Court in *Cameron v. Gebhard*, 85 Tex. 616, 22 S. W. 1033, 1035, (Tex. 1893) 34 Am. St. Rep. 832, stated unequivocally:

> "**If a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place; and then he must have a race with the sheriff for possession.** The unimproved lands of the country and the vacant lots of our cities cannot be acquired for the purpose of making a home by the man who is indebted, except at the risk of turning it over to a creditor. If a man owes nothing, or is able to pay all that he owes, he does not need the exemption; if he has other property, he can protect his home by pointing out that other property is for sale; but, if he has nothing but the homestead, he comes within the necessity of the constitutional provision, and to him is the chief value of exemption." [emphasis added]
>
> The *Cameron* Court cited *Gardner v. Douglass*, 64 Tex. 76, (Tex. 1885) in which the party asserting the homestead claim had purchased an improved place for the purpose and with the avowed intention of making it a

> homestead. It was leased, and he could not get possession of it at the time. It was seized before he moved upon it, and the court held that **his intention to occupy, with the fact that he could not get possession, were sufficient to give the homestead exemption**. The facts of the *Gardner* case are so similar to the facts of this case that the holdings in both *Gardner* and *Cameron* are decisive of the issue under discussion. *Gardner*, in fact, is a 'white horse' case on this issue." [emphasis added]

Petitioner would point out to the Court that such are the facts of this case as well.

Texas law is clear that possession is not the only element required for establishment of a homestead claim and that intention is enough to establish the presumption of homestead. In *McKee v. Smith*, the Second Court of Appeals found that "the Texas Supreme Court directs us to construe the business homestead exemption liberally". 965 S.W.2d at 53. The presumption is that facts which establish a homestead right continue until the contrary is shown. In *Cameron v. Gebhard*, the Supreme Court of Texas said:

> ***"If a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place, and then he must have a race with the sheriff for possession."*** [emphasis added] 22 Tex. at 616.

Respondent's assertion that "Petitioner has not shown in his Petition any fact or circumstance which reflects that the Court of Appeals abused its discretion in affirming the

district court's judgment" [p. 8] is simply not true, based on the foregoing discussion.

Respondent asserts that "neither the district court nor the Court of Appeals based its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence." [p. 9] First, Petitioner's bankruptcy attorney, as attorney of record at all times relevant to this issue, was the attorney responsible for all acts and omissions affecting this case. Second, there is not, and never has been any evidence of any homestead claim or declaration by Petitioner of any property **except** the property in Grapevine, Texas. Thus, Respondent's statement is simply untrue.

Finally, Respondent claims that "Petitioner has not pointed out where the decision of the Court of Appeals is in conflict with another circuit on the same important matter, or has decided an important federal question in a way that is in conflict with a decision of the Texas Supreme Court." The [unpublished] decision of the Court of Appeals is in direct conflict with existing federal case law on excusable neglect as well as being based on an incorrect analysis of the facts. Further, the denial of Petitioner's Homestead designation is in direct conflict with settled law established by the Texas Supreme Court on a seminal U.S. Constitutional issue: Petitioner's constitutional property rights and his Fourth Amendment rights.

Petitioner continues to be irreparably damaged by being illegally deprived of his use, ownership and possession of his Business Homestead by Respondent's actions, and is being prevented from making further attempts to secure and manage the real estate that is his by the Probate Court's conflicting decree in which he was granted ownership of the property and simultaneously denied the privileges of its

ownership in violation of his Fourth Amendment and Constitutional property rights.

CONCLUSION

For the reasons above, Petitioner respectfully requests this Court grant certiorari, and after appropriate briefing and hearing, reverse and remand this matter for new trial to the Bankruptcy Court or the Federal District Court.

Respectfully submitted,
Frank P. Hernandez
Attorney for Appellant
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (FAX)

Frank P. Hernandez
Tx. Bar No. 09516000